

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yolo)**

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMANTHA GREEN,

Defendant and Appellant.

C083617

(Super. Ct. No. CRF15-1239)

ORDER MODIFYING OPINION
AND DENYING PETITION
FOR REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the nonpublished opinion filed herein on February 13, 2019, be modified as follows:

1. On page 34, in the first sentence of part 3.2, delete the opinion's final footnote, footnote 18, which reads:

18 At trial, defendant did not object to Dr. Gerbasi's testimony on the ground she raises on appeal. In her motion for new trial, defendant argued

the trial court erred in allowing Dr. Gerbasi to opine on her credibility.
Without elaboration, the trial court rejected defendant's argument.

This modification does not change the judgment. Appellant's petition for rehearing is denied.

BY THE COURT:

RAYE, P. J.

BUTZ, J.

DUARTE, J.

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(Super. Ct. No. CRF15-1239)

In February 2015, defendant Samantha Green’s newborn son was found dead near a slough in the Knights Landing area of Yolo County on the Sacramento River. After a jury trial, she was found guilty of second degree implied malice murder. (Pen. Code, §§ 187, subd. (a), 188.)¹ The trial court sentenced her to 15 years to life in state prison.

On appeal, defendant contends the judgment must be reversed because trial counsel rendered ineffective assistance in failing to: (1) request the trial court instruct the jury with CALCRIM No. 3428 (“Mental Impairment: Defense to Specific Intent or

¹ Undesignated statutory references are to the Penal Code.

Mental State”); (2) argue that evidence of her mental disorder (amphetamine-induced psychotic disorder) could be considered in determining whether she had the requisite mental state to be convicted of second degree implied malice murder; and (3) timely object to expert testimony opining on her credibility. We will affirm the judgment.

FACTUAL BACKGROUND

In view of the issues raised on appeal, we do not attempt to recite all the facts underlying defendant’s murder conviction. Instead, we summarize the pertinent facts.² Additional background information relevant to defendant’s claims is discussed *post*.

Defendant began using methamphetamine in 2012. She used regularly, with some periods of abstinence, and hallucinated during “bad trips.”

In February 2015, defendant lived in Woodland with her boyfriend/drug dealer, Frank R. (Frank), his parents, and his four children. Defendant was 22 years old.

In February 2015, defendant gave birth to a boy, J.R. He tested positive for methamphetamine and was placed in the neonatal intensive care unit. Due to the positive drug test, Child Protective Services (CPS) placed a protective hold on him.

Defendant was eventually allowed to take J.R. home after a safety plan was developed and she and Frank tested negative for methamphetamine. As part of the safety plan, defendant and Frank agreed to submit to random drug testing and participate in drug treatment. A social worker specifically advised defendant that CPS would take custody of J.R. if she failed a drug test. According to the social worker, defendant understood

² Defendant did not testify at trial. However, she was interviewed numerous times by law enforcement following her son’s death. She also made multiple jail phone calls after she was arrested. Some of the facts recited above are taken from the recorded interviews and jail phone calls, which were played for the jury. The record discloses that defendant gave numerous inconsistent accounts of what happened. We do not attempt to summarize all of those accounts.

that her drug use was a problem and dangerous and appeared willing to address the problem.

By mid-February 2015, defendant was using methamphetamine on a daily basis. From February 20 through February 22, she used a significant amount of methamphetamine, including two rectal injections administered by Frank.³ Around 3:00 a.m. on February 23, Frank gave defendant a third rectal injection, which contained a much larger amount of methamphetamine than the prior injections. Thereafter, they had sexual intercourse but did not sleep.

When Frank's children woke up later that morning around 6:00 a.m., it was cold outside. Defendant took five hits of methamphetamine and then made breakfast and lunch for them. Thereafter, she took two more hits of methamphetamine and drove to the home of the grandmother of Frank's four oldest children, to pick one of them up for school. When defendant arrived around 8:20 a.m., it was clear to the grandmother that defendant was under the influence of drugs—she was frantic, ranting, and moving her arms around. The grandmother had never seen defendant in a worse state; she was “very upset and messed up.”

After dropping the children off at school, defendant returned home. As she was hanging out with Frank and J.R., Frank told her that they needed to drive to Ninth Street in Knights Landing to pick up his friend, M.C. Frank told defendant that he wanted to have a “threesome” with her and M.C. Defendant was not interested in going with Frank to pick up M.C.; she suspected that Frank was cheating on her with M.C. and was jealous of her. At that time, defendant was just getting over the fact that Frank had recently cheated on her with his ex-wife.

³ A rectal injection of methamphetamine quickly introduces a higher volume and density of the drug into a person's system, resulting in a more powerful high.

Shortly before 10:00 a.m., defendant and Frank drove separate cars to a check-cashing store in Woodland. Thereafter, they stopped at two different gas stations in Woodland. Around 10:45 a.m., Frank drove by himself to pick up M.C. Meanwhile, defendant drove around Woodland, made a few stops, and then went home to get a bottle for J.R. Around 1:00 p.m., she spoke with Frank's father, who did not observe anything unusual about her demeanor. In his opinion, she did not appear intoxicated.

After thinking about Frank and M.C., defendant took two hits of methamphetamine and drove to Knights Landing to look for them. Defendant estimated it was around 1:30 or 2:00 p.m. when she left. However, surveillance video from a gas station showed her traveling toward Knights Landing shortly after 1:00 p.m.

Although defendant did not see Frank's car when she arrived in Knights Landing, she nonetheless decided to take a walk on the levee with J.R. to see if she could find him and M.C. It was "around 2:00-ish" when she started walking.

At some point, defendant descended the levee, took off her shoes, and entered a slough, which was about 50 feet wide and approximately 55 degrees Fahrenheit. As defendant was crossing the slough, she became completely submerged and J.R. started to float away, face down. Defendant, however, managed to grab J.R. and swim to the other side of the slough.

Defendant felt dizzy and repeatedly fell down after she got out of the water. J.R. was crying hard. He cried until he fell asleep. Defendant wrapped him in her jacket, sat against a tree, and fell asleep. She woke up a few times in the night but could not move. At one point, she realized J.R. was dead. She started shaking and cried until she fell asleep.

On the morning of February 24, 2015, it was very cold outside; the temperature reached a low of 33.9 degrees Fahrenheit. When defendant woke up, she still felt "kinda

trippy.” Because she could barely walk and could not hold J.R., she left him behind. She walked around until she fell asleep. She slept so long that the sun burned her back, shoulders, and feet.

Around 5:00 p.m., Ricardo Villasenor was mowing his lawn when he heard defendant screaming for help. He found her walking barefoot on the levee approximately 50 yards from multiple homes. She was wearing a tank top and ripped pants. Her clothes were wet and her face, arms, and legs were scratched. She was very scared, cold, confused, and emotional. Her lips were purple.

Defendant told Villasenor that she had been kidnapped while she was looking for a friend, and that her baby had frozen to death. When asked, defendant indicated that her baby was “[o]n the other side” of the slough. Villasenor had her sit in his car while he called 911.

When a police officer arrived, defendant claimed that she could not remember what had happened. She was disheveled, upset, and crying. When asked, she said “everything” hurt. Defendant explained that she came to the levee to pick up some friends and then “blacked out.” She never mentioned that she had a newborn baby with her. She said that she had crossed the slough earlier that morning and had walked all day. She claimed that she had been lost. When asked about J.R., she could not estimate how far away he was. She thought she had crossed the slough about a mile or two away. She said she left J.R. around 5:00 or 6:00 a.m. to get help. At no point did she mention she had been kidnapped or raped.

After defendant was loaded into an ambulance, she spoke with a detective. She said that J.R. was “[s]omewhere” on the other side of the slough. She explained that she had been looking for Frank and M.C. the previous day because she thought Frank was cheating on her. She claimed that everything got “hazy” while she was walking, and that she fell asleep in a wooded area after she swam across the slough. She remembered

waking up a few times in the night and it being really cold. She said that J.R. was really cold and it all seemed “like a dream.” She thought she had a dream of an older man with white hair and glasses. When asked if she had been sexually assaulted by this man, she was unsure but believed he might have raped her. She denied taking drugs and did not appear to be hallucinating. At one point during the conversation, she nodded off.

When defendant arrived at the hospital, she did not mention that she was hallucinating and did not exhibit any signs suggesting that she was experiencing hallucinations. The next morning, nurses were unable to wake her because she was sleeping so deeply.

At the hospital, defendant tested positive for methamphetamine abuse. She told a doctor that she had memory loss and complete loss of consciousness due to intoxication. Upon discharge, she was diagnosed with methamphetamine intoxication, rhabdomyolysis,⁴ dehydration, and a neck sprain.

On February 25, 2015, J.R. was found near the area where Villasenor had contacted defendant. He was a few hundred yards from a neighborhood. He was wearing a wet, muddy onesie, and had scratches on his hands, arms, legs, and feet. He had long, light-colored hairs in both of his hands.⁵

A forensic pathologist determined that J.R. had died from physiologic stress—a fight-or-flight reaction causing an increase in heart rate and blood pressure—from unfavorable environmental exposure (low temperatures, direct sun, lack of water), while having two small defects of his cardiovascular system (i.e., congenital heart disease).

⁴ Rhabdomyolysis occurs when muscle tissue breaks down in response to an acute event, such as exposure to the elements (e.g., cold temperatures) and/or drug use. It can also be caused by lying down on the ground for an extended period of time.

⁵ Defendant has blond hair.

When asked, the pathologist explained that he could not rule out that J.R.'s congenital heart disease contributed to his death.

Following the death of J.R., defendant claimed that others were responsible for her actions, including Frank.⁶ However, she admitted that J.R. had died in her care while she was having a really "bad trip" on methamphetamine. She said that the amount of methamphetamine she had used "apparently . . . was just too much for [her]." She explained that she had not slept for two days prior to entering the slough and had been in a "haze" since Frank gave her the third rectal injection, noting that everything was "like a dream." She acknowledged that she "could've just stayed at home and gotten over the trip." She said that if it was all just a bad trip then it was her "dumbass fault for doing drugs" and she would take full responsibility. At one point, she said, "Goddamn it, I'm a monster for . . . ever gettin' in that situation."

Defendant was arrested on February 27, 2015. At various points thereafter, she provided the details of her "bad trip," including that she heard Hell's Gates, saw Satan, and thought the apocalypse was coming. She explained that she thought J.R. was half demon and that Frank was the devil. She believed the world was ending and that she needed to cross the slough and stay hidden in order to protect J.R. from the apocalypse and the people (Illuminati) trying to kill him to control the population. Although she could see cars from her location, she stayed hidden because she feared that she and J.R. would be killed if they were found. Defendant claimed that her bizarre beliefs and actions during her "bad trip" were influenced by things Frank had told her, including that "all the major companies would be taken down" during the apocalypse.

⁶ Defendant accused Frank of, among other things, drugging her without her consent. Defendant also claimed she had been drugged and sexually assaulted by a friend of Frank. She said that she crossed the slough with J.R. to escape from him. However, she later admitted that Frank's friend was never in Knights Landing and did not sexually assault her.

On March 1, 2015, defendant spoke to a psychiatrist, Jennifer Chaffin, M.D. at the county jail. During their conversation, defendant admitted to using “a lot” of methamphetamine prior to her arrest. She reported experiencing auditory and visual hallucinations and having bizarre beliefs/delusions. However, she noted that those issues had resolved, i.e., she was no longer experiencing hallucinations or having delusional thoughts. Defendant explained that she did not have psychotic symptoms when she was sober. She reported that she had never been treated for mental health issues but noted that she had participated in counseling as a child due to abuse.⁷

Dr. Chaffin diagnosed defendant as suffering from amphetamine dependence and a history of methamphetamine-induced psychotic disorder. Dr. Chaffin explained that her diagnosis was based on defendant’s claim that she had experienced hallucinations and delusions while on methamphetamine but was no longer experiencing those symptoms. Defendant reported hearing and seeing things that “weren’t there” and believed “crazy things that weren’t real.” When asked, Dr. Chaffin explained that the difference between methamphetamine-induced psychosis and methamphetamine intoxication is that methamphetamine-induced psychosis involves psychotic symptoms—hallucinations and/or delusions. She noted that not all people who use methamphetamine have psychotic symptoms, and that a diagnosis of methamphetamine-induced psychosis is not proper unless a person actually experienced hallucinations and/or delusions.

DISCUSSION

Defendant contends the judgment must be reversed because trial counsel rendered ineffective assistance in failing to: (1) request the trial court instruct the jury with CALCRIM No. 3428 (Mental Impairment: Defense to Specific Intent or Mental State);

⁷ While she was incarcerated, defendant told a social worker that she had been diagnosed with anxiety disorder a couple of years earlier. She reported that she did not take medication for that condition.

(2) argue that evidence of her mental disorder (amphetamine-induced psychotic disorder) could be considered in determining whether she had the requisite mental state to be convicted of second degree implied malice murder; and (3) timely object to expert testimony opining on her credibility.

1.0 Legal Standard

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. [Citations.] The ultimate purpose of this right is to protect the defendant’s fundamental right to a trial that is both fair in its conduct and reliable in its result. [Citations.] [¶] Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance. [Citations.] Specifically, it entitles [the defendant] to ‘the reasonably competent assistance of an attorney acting as his [or her] diligent conscientious advocate.’ ” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

To demonstrate ineffective assistance of counsel, a defendant must show counsel’s performance was deficient because his or her representation fell below an objective standard of reasonableness under prevailing professional norms. A defendant must also show prejudice flowing from counsel’s deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-689 [80 L.Ed.2d 674, 699] (*Strickland*); *In re Avena* (1996) 12 Cal.4th 694, 721.) That is, “a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.) “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.” (*Id.* at p. 693.) The defendant must show that counsel’s deficient performance “ ‘so undermined the proper functioning of the adversarial process

that the trial cannot be relied on as having produced a just result.’ ” (*People v. Kipp* (1998) 18 Cal.4th 349, 366, quoting *Strickland*, at p. 686.)

The standard for establishing ineffective representation is “highly demanding.” It requires a defendant to prove that he was denied a fair trial by the “gross incompetence” of counsel. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382 [91 L.Ed.2d 305, 323-324].) “There is a strong presumption that counsel’s performance falls within the ‘wide range of professional assistance,’ [citation]; the defendant bears the burden of proving that counsel’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. [Citation.] The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential.” (*Id.* at p. 381.) “On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation.” (*People v. Mai*, *supra*, 57 Cal.4th at p. 1009.)

“[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” (*Strickland*, *supra*, 466 U.S. at p. 697.) Alternatively stated, “[i]f a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel’s performance was deficient.” (*People v. Kipp*, *supra*, 18 Cal.4th at p. 366.)

2.0 Additional Background

2.1 *Pretrial Ruling on Expert Testimony*

Less than two weeks before trial was initially scheduled to commence, defendant disclosed that she intended to call a forensic psychiatrist, Matthew Soulier, M.D., to testify that she was suffering from a drug-induced psychosis at the time she went to Knights Landing and entered the slough with J.R. Prior to this disclosure, defendant had repeatedly represented that her mental state would not be an issue at trial.

Shortly after defendant's disclosure, the People filed a motion in limine seeking to exclude Dr. Soulier's testimony on the ground that it was irrelevant under section 28, which prohibits the admission of mental impairment evidence to "negate the *capacity* to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought" but allows such evidence "solely on the issue of whether or not the accused *actually* formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (§ 28, subd. (a), italics added.)

At the trial readiness conference two days later, the prosecutor confirmed that the People's theory of guilt was second degree implied malice murder. The trial court made it clear that it would not permit any defense based on voluntary intoxication but indicated that it might allow a defense of involuntary intoxication and unconsciousness, depending on the evidence presented at trial. The court also stated that it would consider the admissibility of Dr. Soulier's testimony for other purposes on the first day of trial.

After the trial was continued due to the late disclosure of Dr. Soulier as a trial witness, defendant filed a written opposition to the People's motion to exclude his testimony. Defendant argued, among other things, that Dr. Soulier's testimony was relevant and admissible because evidence of voluntary intoxication should be admissible to negate the "awareness/knowledge/intent elements" of implied malice murder. In

support of this argument, defendant acknowledged that section 29.4 expressly prohibits evidence of voluntary intoxication in an implied malice murder case but maintained that the statute is unconstitutional. In addition, defendant argued that evidence of voluntary intoxication was admissible on the issue of motive; specifically, such evidence was admissible to counter the prosecution's theory that she entered the slough to worry, enrage, or otherwise punish Frank. Defendant noted that Dr. Soulier was expected to testify that she entered the slough with J.R. in response to beliefs she held while in a drug-induced psychosis. Finally, defendant argued that Dr. Soulier could testify as to how drug use affected her demeanor and mental acuity, including her memory, focus, concentration, and understanding. In making this argument, defendant stated that she expected the People to claim that her statements to law enforcement after J.R.'s death were false, confusing, and misleading.

At the hearing on the parties' motions in limine, the trial court denied the People's motion to exclude the testimony of Dr. Soulier. The court ruled that Dr. Soulier's proposed testimony was relevant and admissible for limited purposes, including motive. The court explained that its ruling was based on the People's theory of guilt and the prosecutor's stated intent to argue that defendant's actions were motivated by a desire to "somehow elicit a response from [Frank], whether it be jealousy or 'come find me' or something along those lines." There was no specific discussion as to whether Dr. Soulier's testimony was admissible mental impairment evidence under section 28 on the issue of whether defendant actually harbored malice aforethought.

2.2 Trial Testimony

2.2.1 Dr. Matthew Soulier

Dr. Soulier, an associate clinical professor of psychiatry at the University of California, Davis, testified as an expert for the defense in the field of psychiatry. After evaluating defendant about a year after J.R.'s death, he concluded that she was not insane

at the time of the crime because her “primary debilitating factor” was drug use; she was not suffering from “a more primary mental illness in the absence of drugs.”⁸ Dr. Soulier, however, opined that defendant was suffering from a mental disorder—amphetamine-induced psychotic disorder. He explained that he made this diagnosis because defendant was “reporting significant psychotic symptoms in the setting of recent intoxication from methamphetamine.” He further explained: “There is some wiggle room with another diagnosis, which would be . . . methamphetamine [intoxication] with perceptual disturbances, meaning you also become psychotic while you’re high. The principal difference between the two [diagnoses is] that the psychotic symptoms become so severe that they almost start to look like a disorder themselves, and they become so debilitating to the person that that in itself becomes problematic.” When asked, he stated that there is not a “grand difference” between methamphetamine-induced psychosis and methamphetamine intoxication with perceptual disturbances but noted that the latter condition is milder in that “it’s not something that becomes clinically disturbing or something that dramatically debilitates or impairs [someone].” He stated that a person can be diagnosed with methamphetamine-induced psychosis without any prior treatment for the condition.

Dr. Soulier opined that defendant became psychotic from chronic and repetitive “heavy” use of methamphetamine, and that she had been psychotic for “a long time”

⁸ Defendant did not plead not guilty by reason of insanity. Under section 29.8, a defendant may not be found insane “solely on the basis of . . . an addiction to, or abuse of, intoxicating substances.” “This provision ‘makes no exception for brain damage or mental disorders caused solely by one’s voluntary substance abuse but which persists after the immediate effects of the intoxicant have dissipated. Rather, it erects an absolute bar prohibiting use of one’s voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless whether the substances caused organic [brain] damage or a settled mental disorder which persists after the immediate effects of the intoxicant have worn off.’ ” (*People v. McCarrick* (2016) 6 Cal.App.5th 227, 247.)

while she was with Frank. He explained that her young age and daily use of large amounts of methamphetamine increased her propensity to become psychotic and to distort reality, and that her dehydration put her at a greater risk of psychosis. He further explained that her past experiences—testing positive for drugs at birth and abusive relationships with family members and a boyfriend—made her more susceptible to psychosis, and that the “crazy things” Frank had told her (e.g., governmental conspiracies) and the control he was exerting over her contributed to her psychosis.⁹ According to Dr. Soulier, Frank manipulated and emotionally abused defendant; he was a “troubled person” who “played a large role” in her behavior. He used “psychotic content to control and essentially make [defendant] crazy.”

Dr. Soulier concluded that defendant was not suffering from a more severe psychotic illness, such as schizophrenia, because her psychotic symptoms only appeared when she used methamphetamine. When he met with her, she was not suffering from a psychotic illness or reporting any psychotic symptoms and was not showing any signs of a major mental illness. Rather, she was suffering from posttraumatic stress disorder (PTSD) due to her past traumas—abusive relationships and loss of her child. Dr. Soulier explained that methamphetamine-induced psychosis can, as in the case of defendant, be temporary and resolve on its own without medication in the absence of methamphetamine. He noted that while methamphetamine-induced psychosis can become “a more permanent state,” it is more common for the psychosis, like it did here, to “wear[] off over a period of hours to days” when the person stops using.

Dr. Soulier stated that methamphetamine users experience an “elevated manic state” followed by a “hard crash,” and that methamphetamine can exacerbate or

⁹ Dr. Soulier noted that defendant participated in some counseling when she was younger but had never received any psychiatric treatment.

aggravate a person's emotions and cause paranoia and memory loss. He surmised that defendant became sad, devastated, angry, and jealous when Frank went to pick up M.C.

According to Dr. Soulier, defendant went to Knights Landing and entered the slough with J.R. because she held the delusional belief that there was an apocalypse, the government was out to get her, and there might be survivors out there. He opined that her delusions were, in part, the result of Frank "gaslighting"¹⁰ her with a "platform" of "crazy" lies and paranoid and delusional fantasies about government conspiracies and the Illuminati. However, he admitted that defendant had indicated on multiple occasions after the death of J.R. that she did not believe the things Frank was saying.

In forming his opinion about defendant's mental state, Dr. Soulier acknowledged that defendant's story about what had happened, including "a lot" of the delusional and psychotic "stuff," was not reported immediately following J.R.'s death. He also acknowledged that defendant admitted to making certain things up and had changed her story "a lot." When asked if he believed what defendant had told him, he stated, "I don't pretend to be a very good human lie detector." He went on to say, "I am suspect [about] how much [defendant] actually remembers about that whole night. What I am confident in is that she was meth positive. She was intoxicated with methamphetamine. Methamphetamine has the potential to generate psychosis. Does she have every detail right? I mean, if you want to go through every interview [defendant participated in], there's a million examples of where . . . she is not going to state [what happened] exactly as she state[d] it [to me] a year later."

Dr. Soulier conceded that he was not certain that defendant had all the details right about what had happened but nonetheless maintained that he was "within at least

¹⁰ Dr. Soulier described "gaslighting" as a form of abuse and control whereby an individual intentionally tries to make their victim question reality by "talking gibberish and crazy to them."

reasonable medical certainty that there was some psychosis that drove some of [her] behavior”; reasoning that there was no rational explanation for why she went out into the area near the slough and wandered around for 24 hours, which was “extremely disorganized” behavior that made no logical sense. He described defendant’s behavior as “psychotically driven”; she was confused and in a disoriented state after using a significant amount of methamphetamine. He described her mental state as delusional and extremely paranoid, noting that she was experiencing auditory and visual hallucinations.

Dr. Soulier stated that the most important fact supporting his diagnosis was that defendant went into the slough with J.R. and then spent the next 24 hours acting in a highly disorganized way. He explained that, even though defendant’s story was “inconsistent as all get out,” he was “comfortable” with his diagnosis because he could not explain how defendant would enter the slough “other than psychosis.” He stated that he would expect a non-psychotic woman who loves her child to seek help under the circumstances.

2.2.2 Dr. Joan Gerbasi

In rebuttal, Joan Gerbasi, M.D., the chief psychiatrist at California Medical Facility,¹¹ testified for the People as an expert in forensic psychiatry. She diagnosed defendant as suffering from a severe methamphetamine and cannabis use disorder, in remission, and PTSD. She opined that defendant was not suffering from methamphetamine-induced psychosis at the time of the crime. Rather, defendant was “acutely intoxicated” on methamphetamine with perceptual disturbances.

Dr. Gerbasi explained that intoxication is when a person is “high”; psychosis is when a person’s “thought process changes.” She acknowledged that the line between methamphetamine-induced psychosis and methamphetamine intoxication with perceptual

¹¹ California Medical Facility is a prison in Vacaville.

disturbances is “slim.” She explained that methamphetamine intoxication with perceptual disturbances, at its extreme, is a psychosis. When asked, she stated that there was no evidence—e.g., medical records or reports of psychotic behavior—suggesting that defendant was psychotic prior to the day J.R. died.

Dr. Gerbasi stated that methamphetamine use can cause paranoia, obsessive thoughts, disorganized thinking, persecutory delusions, and perceptual disturbances. She noted that users can stay awake for days and then “crash” and sleep for an extended period of time. According to Dr. Gerbasi, symptoms from methamphetamine use typically resolve within a day or two.

Dr. Gerbasi opined it was very likely that jealousy and fear of infidelity motivated defendant to drive to Knights Landing to look for Frank and M.C. She theorized that defendant looked for them, “crashed,” and woke up to find J.R. dead.

When asked, Dr. Gerbasi opined that she did not find credible defendant’s claim that delusional beliefs¹² motivated her behavior.¹³ In forming this opinion, Dr. Gerbasi noted that defendant had changed her story about what had happened multiple times in

¹² Dr. Gerbasi explained that a delusion is a fixed false belief, meaning that a person cannot be convinced that their belief is false. By contrast, a hallucination is hearing, seeing, or feeling something that does not exist. Dr. Gerbasi explained that hallucinations can occur from substance abuse or certain psychotic illnesses. She explained that the definition of psychosis is “disordered thought content,” which includes hallucinations.

¹³ Defendant told Dr. Gerbasi that, after she decided to go to Knights Landing to find Frank and M.C., she saw a cat turn into a demon and thought the apocalypse was taking over and everything Frank had told her was true. Defendant said that Frank had told her that people were living in their attic and that he was in the Illuminati. He also said that “ ‘everything was a government experiment and there was a million-dollar hit on everyone’s head.’ ” Defendant explained that she did not believe the things Frank was telling her until the day she went to Knights Landing with J.R. On that day, she believed that the government was killing people, and that she needed to bring J.R. (whom she believed to be half demon/half human) to Knights Landing so that they could meet up with Frank, M.C., and the other survivors.

significant ways, did not report any paranoid or delusional material when she was found, and had no psychotic symptoms at the hospital or jail, despite reporting a “large” psychosis covering a significant amount of “grandiose” material. Dr. Gerbasi additionally noted that there was no evidence that Frank was psychotic or that he was telling defendant things which contributed to or caused her to become psychotic. Dr. Gerbasi also found it odd that defendant’s reported psychosis was very “on/off,” and that she gave a seamless story in almost increasing detail about what had happened after blacking out, which is very unusual. Finally, Dr. Gerbasi found it hard to believe that a person in defendant’s position would report that they were kidnapped and raped rather than immediately disclose their delusions about an apocalypse.

2.3 *Jury Instructions*

At the close of evidence, the trial court instructed the jury on murder (CALCRIM No. 520 (“First or Second Degree Murder With Malice Aforethought”)) and the lesser included offense of involuntary manslaughter (CALCRIM No. 580). As relevant here, the jury was instructed that defendant was guilty of implied malice murder if she: (1) intentionally committed an act; (2) the natural and probable consequences of the act were dangerous to human life; (3) at the time she acted, she knew her act was dangerous to human life; (4) she deliberately acted with conscious disregard for human life; and (5) the act caused the death of another person. The jury was further instructed that, “A parent has a legal duty to care for a child. If you conclude that [defendant] owed a duty to [J.R.] and [defendant] failed to perform that duty, her failure to act is the same as doing a negligent or injurious act. If you find [defendant] guilty of murder, it is murder of the second degree.”

As for involuntary manslaughter, the jury was instructed, in part, as follows: “When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter. The

difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. [¶] An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another and done in conscious disregard of that risk, is voluntary manslaughter or murder. [¶] An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.” The jury was told that defendant committed involuntary manslaughter if she acted with criminal negligence in taking J.R. into the slough area with little protective clothing and staying there over a cold night. The jury was told that a person acts with criminal negligence when: (1) “he or she acts in a reckless way that . . . creates a high risk of death or great bodily injury”; and (2) “a reasonable person would have known that acting in that way would create such a risk. In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.”

In addition, the trial court instructed the jury with CALCRIM No. 625, as adapted to the case: “You may consider evidence, if any, of [defendant’s] voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether [defendant] was unconscious when she acted. You may also consider that evidence on the issue of whether voluntary intoxication affected the statements [defendant] gave to law enforcement around the time she was found. [¶] Voluntary intoxication is not a defense to implied malice murder. . . . [¶] Methamphetamine is an illegal substance. If you find that [defendant] voluntarily ingested methamphetamine, the fact that methamphetamine may contain an unanticipated substance and/or may have an

unanticipated effect does not make its ingestion less voluntary. You may not consider evidence of voluntary intoxication for any other purpose.”

The jury was also instructed with CALCRIM No. 626, which advised the jury, in part, as follows: “When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious, he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter. [¶] The People have the burden of proving beyond a reasonable doubt that [defendant] was not unconscious. If the People have not met this burden, you must find [defendant] not guilty of murder.”

Defendant did not request CALCRIM No. 3428, which would have advised the jury: “You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state [required for the charged crime], specifically: _____. If the People have not met this burden, you must find the defendant not guilty of [the charged crime].” (CALCRIM No. 3428 (new Jan. 2006).)

2.4 Closing Arguments

The People’s theory of guilt was that J.R. died because of defendant’s “meth-fueled” jealousy. The prosecutor argued that defendant believed that Frank was cheating on her with M.C. and went to Knights Landing to find them while intoxicated on methamphetamine. According to the prosecutor, J.R. died from exposure after defendant crossed the slough with him, failed to immediately seek help, and slept for an extended

period of time after “crashing” on methamphetamine. In arguing that defendant was guilty of second degree implied malice murder, the prosecutor emphasized that defendant’s intoxication was irrelevant and not a defense to that crime because she voluntarily ingested methamphetamine. The prosecutor also emphasized that defendant’s lies showed a consciousness of guilt.

The prosecutor acknowledged that Dr. Soulier had diagnosed defendant as suffering from methamphetamine-induced psychosis but argued that there were a variety of reasons why his diagnosis was flawed. In making this argument, the prosecutor questioned Dr. Soulier’s reliance on defendant’s story about the apocalypse and his conclusion that Frank was partly responsible for her psychosis, noting that Dr. Soulier never spoke with Frank and failed to point to anything corroborating defendant’s claim that she was experiencing hallucinations. The prosecutor told the jury that Dr. Gerbasi had explained why defendant was not psychotic. He noted that Dr. Gerbasi, unlike Dr. Soulier, did not “blindly follow” defendant’s vastly different versions of what had happened, as she found defendant’s story not to be credible.

At the outset of the defense’s closing argument, counsel acknowledged that defendant was responsible for the death of J.R. but argued that she was guilty of involuntary manslaughter, not murder. In support of her argument, counsel stated that the crime was committed while defendant was suffering from methamphetamine-induced psychosis, as Dr. Soulier and Dr. Chaffin concluded. She argued that J.R. died after defendant crossed the slough with him and “crashed out” from methamphetamine and hypothermia. She claimed that defendant was unconscious when J.R. died.

Defense counsel noted that Dr. Gerbasi’s diagnosis—methamphetamine intoxication with perceptual disturbances—was “really not that different” from methamphetamine-induced psychosis. She argued that if methamphetamine or Frank was not involved then defendant would not have entered the slough. According to counsel,

the main difference between Dr. Soulier's diagnosis and Dr. Gerbasi's diagnosis was that Dr. Soulier "put stock in what [defendant] said and Dr. Gerbasi did not. Dr. Gerbasi put stock in [Frank's] denials, and Dr. Soulier did not." She asserted that defendant's inconsistent stories about what had happened were an effort to cope with the reality that her son was dead and it was her fault.

Defense counsel went on to argue that the prosecution had failed to show implied malice, asserting that there was no evidence that defendant consciously disregarded the risk to J.R.'s life. Counsel asserted that there was no evidence defendant entered the slough with the intention of leaving without J.R. before she "crashed" on methamphetamine. She pointed out that there was no evidence that defendant stayed in the slough "thinking she was coming out by herself and didn't care [if that was the result]." Counsel maintained that defendant was guilty of involuntary manslaughter because her actions were criminally negligent, as she did not intend to kill but a reasonable and careful person would not have done what she did. She asserted that when a child dies as a result of [his or her] parent becoming unconscious from drug use, the parent is guilty of involuntary manslaughter. According to counsel, defendant "got high on methamphetamine and could not make rational, logical decisions with proper awareness of her actions . . . prior to the crash."

During final closing argument, the prosecutor argued that defendant was guilty of second degree implied malice murder because she failed to protect her newborn child by crashing on methamphetamine while it was very cold outside. The prosecutor stated, "Voluntary intoxication is not a defense to second degree murder. Voluntary intoxication explains everything that happened on February 23, 2015, and February 24, 2015. Everything [defendant] did was because of her meth-fueled jealousy." The prosecutor explained that defendant was guilty of murder because she intentionally entered the slough with J.R., and that the natural and probable consequences of that act was

dangerous to human life given the cold temperature. According to the prosecutor, defendant knew her conduct was dangerous to human life and did not care because of her methamphetamine-fueled jealousy. He reiterated that voluntary intoxication is not a defense to implied malice murder but noted that a conviction for involuntary manslaughter was warranted if the jury found that defendant was unconscious. The prosecutor stated, “[Defendant] cannot say she didn’t know. She cannot say she . . . did not act deliberately because she was intoxicated, and she can’t say she didn’t act intentionally because she was intoxicated. She can’t say any of that. You can’t consider any of that.” However, the prosecutor noted that defendant’s intoxication could be used to show guilt; specifically, knowledge of danger, because she knew that methamphetamine caused her to “see things” and “crash.”

The prosecutor concluded by arguing the evidence showed that defendant acted with conscious disregard to the danger to J.R.’s life, which resulted in his death. The prosecutor asserted that the only time defendant became unconscious for purposes of this case was after J.R. died. He stated, “Every act [defendant] did, although perhaps chaotic, clearly fueled by methamphetamine intoxication and rooted in jealousy, was a conscious act. And each moment she remained out in that slough was one more moment she could have gone for help, turned around, gone back to the car, screamed, anything. She did none of those, and that baby died. And that is second degree murder.”

At no point did the prosecutor specifically argue that Dr. Soulier’s diagnosis of methamphetamine-induced psychotic disorder was irrelevant to whether defendant formed the requisite mental state for second degree implied malice murder.

3.0 Analysis

3.1 *Failure to Request CALCRIM No. 3428 and Argue Its Significance to the Jury*

CALCRIM No. 3428 is a pinpoint instruction that must be given only if requested by the defendant, and only if substantial evidence supports the defense theory that defendant's mental disease or disorder affected the formation of the relevant intent or mental state. (*People v. Townsel* (2016) 63 Cal.4th 25, 58; see *People v. Ervin* (2000) 22 Cal.4th 48, 91.)

Recognizing that she has forfeited any claim of instructional error, defendant contends trial counsel was ineffective in failing to request CALCRIM No. 3428 and argue its significance to the jury in closing argument. She maintains that the instruction was warranted because Dr. Soulier testified she was suffering from a mental disorder at the time of the commission of the crime. We find no basis for reversal.

“Murder and manslaughter are the forms of criminal homicide.” (*People v. Elmore* (2014) 59 Cal.4th 121, 132 (*Elmore*).) “Murder is the unlawful killing of a human being . . . with malice aforethought.” (§ 187, subd. (a).)

Malice may be express or implied. (§ 188.) “It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.” (*Ibid.*) “ ‘Intent to unlawfully kill and express malice are, in essence, “one and the same.” ’ ” (*People v. Perez* (2010) 50 Cal.4th 222, 233, fn. 7; *People v. Smith* (2005) 37 Cal.4th 733, 739.)

Malice “is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (§ 188.) Because section 188’s “abandoned and malignant heart” language is of little assistance in defining the concept of implied malice, it requires judicial interpretation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Our Supreme Court has interpreted malice to be

implied “when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.” (*People v. Cook* (2006) 39 Cal.4th 566, 596; see *People v. Chun*, *supra*, 45 Cal.4th at p. 1181 [explaining that implied malice has a physical component—the performance of an act, the natural consequences of which are dangerous to life—and a mental component—defendant knows that his or her conduct endangers the life of another and acts with a conscious disregard for life].) Stated differently, implied malice murder is committed when the defendant subjectively appreciates the risk his or her actions pose to others but proceeds anyway with a conscious disregard for life. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1008 (*Butler*).)

The primary difference between express malice and implied malice is that the former requires an intent to kill but the latter does not. (*People v. Saille* (1991) 54 Cal.3d 1103, 1115.)

“ ‘A killing with express malice formed willfully, deliberately, and with premeditation constitutes first degree murder.’ [Citation.] ‘Second degree murder is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.’ ” (*Elmore*, *supra*, 59 Cal.4th at p. 133.)

Manslaughter, in contrast to murder, lacks the element of malice. (*Elmore*, *supra*, 59 Cal.4th at p. 133 [“Manslaughter, a lesser included offense of murder, is an unlawful killing without malice.”].) An unlawful homicide without intent to kill and without conscious disregard for life is involuntary manslaughter. (*Butler*, *supra*, 187 Cal.App.4th at p. 1006.) A defendant commits involuntary manslaughter when a reasonable person objectively “would have been aware of the risk” inherent in the defendant’s actions, but the defendant did not grasp the risk. (*Id.* at p. 1008.) This culpable lack of awareness is

sometimes described as criminal negligence. “ “[C]riminal negligence” ’ exists when the defendant engages in conduct that is ‘ “aggravated, culpable, gross, or reckless” ’; i.e., conduct that is ‘ “such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.” ’ ’ (Ibid.)

“[T]he essential distinction between second degree murder based on implied malice and involuntary manslaughter is the subjective versus objective criteria to evaluate the defendant’s state of mind—i.e. if the defendant commits an act which endangers human life without realizing the risk involved, he [or she] is guilty of manslaughter, whereas if he [or she] realized the risk and acted in total disregard of the danger, he [or she] is guilty of murder based on implied malice.” (*People v. Cleaves* (1991) 229 Cal.App.3d 367, 378.)

“Diminished capacity was a judicially created concept. It allowed defendants to argue that because of mental infirmity, they lacked ‘awareness of the obligation to act within the general body of laws regulating society,’ and therefore were incapable of acting with malice.” (*Elmore, supra*, 59 Cal.4th at p. 135.) “ ‘The essence of a showing of diminished capacity is a “showing that the defendant’s mental capacity was reduced by *mental illness, mental defect or intoxication.*” ’ ” (*People v. Steele* (2002) 27 Cal.4th 1230, 1253.) However, the defense of diminished capacity was abolished by the Legislature in 1981. (*Ibid.*; *Elmore, supra*, 59 Cal.4th at p. 135.) Only the defense of “diminished *actuality*” survived. (*Steele, supra*, at p. 1253.) “To support a defense of ‘diminished actuality,’ a defendant presents evidence of voluntary intoxication or mental condition to show he [or she] ‘*actually*’ lacked the mental states required for the crime.” (*People v. Clark* (2011) 52 Cal.4th 856, 880, fn. 3, italics added; see §§ 28 [evidence of

mental disease, mental defect, or mental disorder], 29.4, subd. (b) [evidence of voluntary intoxication].)

Under section 28, “[e]vidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the *capacity* to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act” but “is admissible solely on the issue of whether or not the accused *actually* formed a required specific intent, premeditated, deliberated, *or harbored malice aforethought*, when a specific intent crime is charged.” (§ 28, subd. (a), italics added.)¹⁴ Thus, “evidence of mental illness may be offered to show the absence of specific intent but not to prove the absence of general intent.” (*People v. Thiel* (2016) 5 Cal.App.5th 1201, 1209, italics omitted.)

¹⁴ Under section 29, “any expert testifying about a defendant’s mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.”

“In other words, the defendant *can* call an expert to testify that he [or she] had a mental disorder or condition (such as PTSD or dissociation), as long as that testimony tends to show that the defendant did or did not in actuality (as opposed to capacity) have the mental state (malice aforethought, premeditation, deliberation) required for conviction of a specific intent crime (as opposed to a general intent crime) with which he [or she] is charged, except that the expert cannot offer the opinion that the defendant actually did, or did not, harbor the specific intent at issue. Put differently, sections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he [or she] may have, or how that diagnosis or condition affected him [or her] at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he [or she] is charged.” (*People v. Cortes* (2011) 192 Cal.App.4th 873, 908.)

Under section 29.4, “[e]vidence of voluntary intoxication shall not be admitted to negate the *capacity* to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought . . . ” (§ 29.4, subd. (a), italics added) but “is admissible solely on the issue of whether or not the defendant *actually* formed a required specific intent, *or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought*” (*id.*, subd. (b), italics added). Our Supreme Court recently concluded that, “Because harbored *implied* malice does not appear in this enumerated list, section 29.4 prohibits the use of evidence of voluntary intoxication to establish that a defendant acted without implied malice.” (*People v. Soto* (2018) 4 Cal.5th 968, 975 (*Soto*); see *People v. Turk* (2008) 164 Cal.App.4th 1361, 1375 [evidence of “voluntary intoxication [is] inadmissible to negate implied malice in cases in which a defendant is charged with murder”].)

Prior to its amendment in 1995, the California Supreme Court interpreted section 22 (the predecessor to section 29.4)¹⁵ to allow evidence of voluntary intoxication to negate both express *and implied malice* aforethought. (*People v. Whitfield* (1994) 7 Cal.4th 437, 450-451 (*Whitfield*) [concluding that section 22 “was not intended, in murder prosecutions, to preclude consideration of evidence of voluntary intoxication on the issue whether a defendant harbored malice aforethought, whether the prosecution proceeds on a theory that malice was express or implied”].) When *Whitfield* was decided, former section 22, subdivision (b) made no distinction between express and implied malice. It provided: “ ‘Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or *harbored malice aforethought*, when a specific intent crime

¹⁵ Former section 22 was renumbered section 29.4 in 2012, without substantive modifications relevant here. (Stats. 2012, ch. 162, § 119, p. 2617.)

is charged.’ ” (*Whitfield, supra*, 7 Cal.4th at p. 446, italics added.) The Legislature amended the statute in direct response to *Whitfield* to prohibit evidence of voluntary intoxication to negate implied malice.¹⁶ (See *Soto, supra*, 4 Cal.5th at p. 977; *People v. Berg* (2018) 23 Cal.App.5th 959, 966 [“[The] legislative history makes clear that the Legislature amended the statute to abrogate [*Whitfield*], where the Supreme Court had determined voluntary intoxication evidence was admissible in an implied malice murder prosecution.”].)

Notably, unlike section 29.4, the admissibility of mental impairment evidence under section 28 is not specifically limited in murder cases to evidence on the question of premeditation, deliberation, or *harbored express malice aforethought*. (See §§ 28, 29.4.) Instead, section 28 permits the introduction of mental impairment evidence on the question of whether defendant *harbored malice aforethought* when a specific intent crime is charged. (§ 28, subd. (a).) Like former section 22, section 28 makes no distinction between express and implied malice. In *Whitfield*, our Supreme Court, in interpreting former section 22, which contains language similar to the current text of section 28, concluded that “the Legislature considered murder a ‘specific intent crime’ within the meaning of . . . section 22 whether the prosecution’s theory is that malice is express or implied.” (*Whitfield, supra*, 7 Cal.4th at pp. 449-451 [explaining that although implied malice does not literally fall within the definition of specific intent previously articulated by the court, the element of implied malice requiring the defendant to act with knowledge of the danger to, and in conscious disregard of, human life, is “closely akin” to that definition of specific intent, which requires proof that the defendant acted with a specific and particularly culpable mental state]; *People v. Cameron* (1994) 30 Cal.App.4th 591, 599-600 [second degree implied malice murder is a specific intent crime within the

¹⁶ The Legislature did not amend section 28 when it amended former section 22.

meaning of former section 22].) The Legislature’s amendment of former section 22 in 1995 did not abrogate *Whitfield* on this point, and we are unaware of any authority holding that second degree implied malice murder is a general intent crime within the meaning of section 28.¹⁷ (See *Whitfield, supra*, 7 Cal.4th at p. 450 [“it is quite clear” that implied malice does not constitute a general intent as previously described by the court].) Thus, by statute and case law, mental impairment evidence is arguably admissible on the issue of whether a defendant harbored implied malice in a murder prosecution. We need not and do not decide that question here. Defendant has failed to demonstrate that reversal is required due to defense counsel’s failure to request and argue one specific instruction—CALCRIM No. 3428.

Here, the record discloses that defendant was voluntarily intoxicated on methamphetamine when she went to Knights Landing and entered the slough with J.R. Defendant’s psychiatric expert, Dr. Soulier, opined that she was suffering from a mental disorder at the time—amphetamine-induced psychotic disorder. According to Dr. Soulier, defendant was experiencing hallucinations and having delusional thoughts; she believed that she needed to enter the slough and hide to protect her newborn son. The hallucinations and delusions, however, were temporary and stemmed primarily from defendant’s drug use in the days leading up to the killing. They stopped after the effects of the methamphetamine wore off. There was no evidence defendant had a mental disorder with psychotic features independent of her state of voluntary intoxication at the time of her crimes.

¹⁷ The People argue that implied malice murder is a general intent crime but cite no authority that expressly holds as much. In *Whitfield*, Justice Mosk, contrary to the majority, concluded that implied malice murder is not a specific intent crime. (See *Whitfield, supra*, 7 Cal.4th at pp. 462-465 (conc. & dis. opn. of Mosk, J.) [concluding that “ ‘second degree murder based on implied malice is a general intent crime but with the requirement of a certain mental state’ ”].) The People have not cited a case reaching the same conclusion as Justice Mosk.

On this record, we conclude that defendant has not established ineffective assistance of counsel. She has not shown that she was denied a fair trial due to the gross incompetence of trial counsel. Defendant cites no authority establishing that she was entitled to the CALCRIM No. 3428 instruction on the facts of this case. We are not convinced that evidence of a methamphetamine-induced mental disorder was admissible on the issue of whether defendant actually harbored implied malice. In our view, allowing such evidence for this purpose under the circumstances would contravene the Legislature's intent in amending former section 22 to expressly prohibit evidence of voluntary intoxication to negate implied malice in murder cases. We are not persuaded that the Legislature intended a different result when a defendant becomes so intoxicated on drugs he or she experiences a temporary psychosis. Indeed, the Legislature amended former section 22 following *Whitfield* to expressly prohibit voluntary intoxication from being an excuse for poor judgment when someone kills. (See *Soto, supra*, 4 Cal.5th at pp. 977-978 [in amending former section 22, the Legislature determined that a defendant who acts with conscious disregard for life should be punished for murder regardless of whether voluntary intoxication impaired his or her judgment].) Under the circumstances, we cannot conclude that trial counsel's conduct in failing to request CALCRIM No. 3428 and argue its significance to the jury fell below an objective standard of reasonableness under prevailing professional norms.

Defendant has also failed to show prejudice. She has not demonstrated that it is reasonably probable the outcome of the proceeding would have been different in the absence of trial counsel's alleged deficient performance. The omission of the CALCRIM No. 3428 instruction did not remove from the jury's consideration or incorrectly define the intent element of second degree implied malice murder. Instead, defendant was deprived of a pinpoint instruction specifically directing the jury that they could consider

evidence of her purported mental disorder in determining whether she acted with the requisite intent for that crime.

At the outset, we recognize that defendant's mental state was the critical issue at trial, as it was undisputed that J.R. died from exposure after defendant entered the slough with him on a cold day and did not seek help until after he died. The trial court allowed defendant to introduce expert testimony showing that she was suffering from a drug-induced psychotic disorder at the time of the crime. The jurors were instructed to consider Dr. Soulier's testimony, determine its meaning and importance, and evaluate its believability by using their common sense and experience. The jury instructions did not advise the jury that evidence of a mental disorder was irrelevant on the issue of intent. Instead, the jury was advised that voluntary intoxication is not a defense to second degree implied malice murder and could be considered only in a limited way, including whether defendant was unconscious of her actions and whether voluntary intoxication affected the statements she made to law enforcement around the time she was found. The jury was told that if someone dies as a result of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter. The jury was further advised that defendant could not be convicted of second degree murder unless it found beyond a reasonable doubt that defendant acted with implied malice, including that she intentionally committed an act she knew was dangerous to J.R.'s life and deliberately acted with conscious disregard for his life. (CALCRIM No. 520.) The jury was told that an unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter. The jury instructions defined criminal negligence and advised the jury that defendant was guilty of involuntary manslaughter if she was criminally negligent in taking J.R. into the slough area with little protective clothing and staying there over a cold night.

During closing argument, defense counsel pointed out that defendant was suffering from a mental disorder at the time of the crime and argued that the People had failed to establish implied malice murder because there was no evidence that defendant consciously disregarded the risk to J.R.'s life. While defense counsel did not specifically argue that defendant actually lacked the mental state necessary to be convicted of implied malice murder due to her mental disorder, her arguments suggested as much. Moreover, the prosecutor never argued that mental disorder evidence was irrelevant on the issue of intent. Instead, the prosecutor argued that evidence of voluntary intoxication was irrelevant and not a defense to second degree implied malice murder. The experts agreed that defendant was intoxicated on methamphetamine but disagreed as to her mental state; Dr. Soulier opined she was suffering from a drug-induced psychotic disorder while Dr. Gerbasi opined that she was suffering from acute intoxication with perceptual disturbances. Nothing in the jury instructions or the arguments of counsel indicated that the jury was precluded from considering the evidence of defendant's purported mental disorder in deciding whether the People had carried their burden of proving that defendant actually formed the mental state required to be convicted of second degree implied malice murder.

On this record, we conclude that defendant has not established prejudice. Defendant presented expert evidence on mental disorder and intent that was inextricably intertwined with her state of voluntary intoxication at the time of her crimes. In closing argument, defense counsel argued that defendant was suffering from a mental disorder at the time of the crime and that the People had failed to carry their burden of proof to establish the mental state required for implied malice murder. The jury was not told that it could not consider defendant's purported mental disorder in determining whether she actually formed the requisite intent to be found guilty of second degree implied malice

murder. Under these circumstances, we are convinced that defendant was not prejudiced by trial counsel's alleged deficient performance.

3.2 *Expert Testimony of Dr. Gerbasi*

Defendant contends that trial counsel should have objected when Dr. Gerbasi exceeded the proper limits of expert testimony by rendering an opinion on her credibility. Anticipating that her claim has been forfeited because she failed to lodge a timely objection,¹⁸ defendant argues that reversal is required because trial counsel was ineffective.

After the case was fully briefed, we granted the People's motion to augment the record to include defendant's pretrial in limine motion to limit the expert testimony of Dr. Gerbasi. In that motion, defendant sought an order precluding Dr. Gerbasi from offering an opinion on whether she " 'was being truthful in her account of previous events.' " Defendant argued that such an opinion should be excluded because "opinions on one's truthfulness are improper expert opinion." At oral argument on appeal, the People represented that defendant's pretrial objection to Dr. Gerbasi's testimony was made with the understanding that it would be considered a continuing objection to its admission, and thus there was no need for further objection. In view of these circumstances, we conclude the evidentiary issue was preserved for appeal and construe defendant's argument as claiming that the trial court prejudicially erred in allowing Dr. Gerbasi to opine on her credibility. We find no basis for reversal.

"The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond

¹⁸ At trial, defendant did not object to Dr. Gerbasi's testimony on the ground she raises on appeal. In her motion for new trial, defendant argued the trial court erred in allowing Dr. Gerbasi to opine on her credibility. Without elaboration, the trial court rejected defendant's argument.

common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.) In *Coffman*, that rule was violated when a psychologist opined that one of the defendants was “ ‘a credible reporter’ ” of events and “ ‘was not lying about what happened to her.’ ” (*Id.* at pp. 81-83 & fn. 26.)

Here, Dr. Chaffin diagnosed defendant as suffering from amphetamine dependence and a history of methamphetamine-induced psychotic disorder. She explained that her diagnosis was based on defendant's claim that she had experienced hallucinations and delusions while on methamphetamine but was no longer experiencing such symptoms. Dr. Chaffin explained that the difference between methamphetamine-induced psychosis and methamphetamine intoxication is that methamphetamine-induced psychosis involves psychotic symptoms—hallucinations and/or delusions. She noted that a diagnosis of methamphetamine-induced psychosis is not proper unless a person experienced psychotic symptoms.

Dr. Soulier also diagnosed defendant as suffering from amphetamine-induced psychotic disorder. He explained that a physician must rely on the symptoms reported by a person in order to make such a diagnosis. He further explained that a person can be erroneously diagnosed if he or she falsely reports symptoms and acknowledged that it was possible defendant had lied to him. He opined that defendant was suffering from an amphetamine-induced psychotic disorder because she reported experiencing significant psychotic symptoms—hallucinations and delusions—in the context of methamphetamine intoxication. When asked, he acknowledged that his opinion was based “principally” on his interview with defendant.

Dr. Gerbasi disagreed with Dr. Chaffin's and Dr. Soulier's diagnosis, opining that defendant was not psychotic but rather “acutely intoxicated” on methamphetamine with

perceptual disturbances. In support of her opinion, Dr. Gerbasi detailed the reasons why she did not find credible defendant's claim that delusional beliefs motivated her behavior, including, among other things, her failure to immediately report her psychotic symptoms, her multiple inconsistent stories about what had happened, and the absence of psychotic symptoms at the hospital and jail.

The trial court instructed the jury regarding the use of expert witness testimony, specifying, "You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide." (CALCRIM No. 332.) The court also directed the jury to consider "the reasons the expert gave for any opinion and the facts or information on which the expert relied in reaching that opinion," and that it "may disregard any opinion that [it] find[s] unbelievable, unreasonable or unsupported by the evidence." (*Ibid.*) The jury was further instructed that, "If the expert witnesses disagreed with one [an]other, [it] should weigh each opinion against the other[]" and "examine the reasons given for each opinion and the facts []or other matters on which each witness relied." (*Ibid.*) The jury was specifically told that it "alone must judge the credibility or believability of the [expert] witnesses." (CALCRIM Nos. 226, 332.)

We need not decide whether the trial court erred in allowing the challenged expert testimony because we conclude any error was harmless. The experts agreed that defendant was intoxicated on methamphetamine at the time of the crime. Their differing opinions on her mental state turned on whether she actually experienced the significant psychotic symptoms she reported. To make that determination, the experts necessarily had to assess whether defendant was telling the truth about those symptoms. Thus, while Dr. Soulier, unlike Dr. Gerbasi, did not directly testify as to defendant's credibility, his diagnosis, effectively, credited her claim that she was experiencing severe psychotic symptoms—hallucinations and delusions. During closing argument, defense counsel

specifically pointed out that the experts reached different opinions because Dr. Soulier “put stock” in what defendant said and Dr. Gerbasi did not.

Nothing in the record suggests that the jury failed to follow the instructions on how to evaluate the differing opinions offered by the experts. The record makes clear that defendant’s credibility was the primary factor that the experts relied on in reaching their respective opinions. There is no reason to believe the jury did not, as instructed, judge the believability of the expert testimony by considering the reasons supporting the opinions. We presume that the jury followed the court’s instructions. (*People v. Edwards* (2013) 57 Cal.4th 658, 723.) On this record, we are not persuaded that it is reasonably probable that the outcome of the proceeding would have been different absent the asserted evidentiary error. (*People v. Pearson* (2013) 56 Cal.4th 393, 446 [“ ‘[t]he erroneous admission of expert testimony only warrants reversal if “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error” ’ ”].)

DISPOSITION

The judgment is affirmed.

We concur:

_____**BUTZ**_____, J.

_____**RAYE**_____, P. J.

_____**DUARTE**_____, J.